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Power Plays: Reallocating Power under the New Russian Federation Code of Criminal Procedure

Lauren Chen

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TABLE OF CONTENTS

| | | |
|------|--|-----|
| I. | Introduction | 430 |
| II. | Background | 432 |
| | A. Criminal Procedure in the Soviet Union..... | 432 |
| | B. Criminal Procedure in the Russian Federation | 438 |
| III. | The Russian Federation Code of Criminal Procedure..... | 443 |
| | A. Goals of the New CCP..... | 443 |
| | B. Specific CCP Provisions Reallocate Power Among Judges, Procurators, and Defense Attorneys | 444 |
| | 1. Definitions..... | 444 |
| | 2. Defense Counsel | 445 |
| | 3. Adversarial Proceedings | 446 |
| | 4. Pretrial Investigation | 447 |
| | 5. Search and Seizure..... | 449 |
| | 6. Court-Sanctioned Arrests and Pretrial Detention | 451 |
| | 7. Presumption of Innocence and Burden of Proof..... | 453 |
| | 8. Inadmissible Evidence | 454 |
| | 9. Double Jeopardy | 455 |
| | 10. Trial by Jury..... | 457 |
| IV. | Preliminary Results: A Successful Reallocation of Power?..... | 457 |
| | A. Successful Implementation of Specific CCP Provisions Reallocating Power Among Judges, Procurators, and Defense Attorneys? | 458 |
| | 1. Defense Counsel | 458 |
| | 2. Adversarial Proceedings | 459 |
| | 3. Search and Seizure..... | 461 |
| | 4. Court-Sanctioned Arrests and Pretrial Detention | 461 |
| | 5. Presumption of Innocence and Burden of Proof..... | 464 |
| | 6. Inadmissible Evidence | 465 |
| | 7. Double Jeopardy | 465 |
| | 8. Trial by Jury..... | 467 |
| | B. Successful Implementation of the CCP as a General Theory of Criminal Law? | 468 |
| V. | Conclusion..... | 469 |

I. Introduction

December 18, 2001 marked a historic day in Russia's¹ legislative and legal history. After years of tedious drafting and revising by the Duma's Legislation Committee,² President Vladimir Putin signed into law the new *Russian Federation Code of Criminal Procedure* (CCP) into law.³ Prior to the enactment of the CCP, the *pre-glasnost*⁴ Soviet-era *Code of Criminal Procedure of the Russian Soviet Federated Socialist Republic* (RSFSR)⁵ governed criminal procedure in post-communist Russia. The Soviet laws remained in effect as long as they were not contrary to or replaced by new laws.⁶ This situation created a confusing asymmetry between the rights of Russian citizens as enumerated in the 1993 Constitution⁷ and their rights in practice under the Soviet laws of criminal procedure.⁸ The provisions of the new CCP, however, have finally aligned the rules governing Russia's criminal investigation and trial process with many of the more

¹ The name of the republic was officially changed from the Russian Soviet Federative Socialist Republic (RSFSR or the Soviet Union) to the Russian Federation on December 25, 1991. *Vedomosti Fed. Sobr. RF*, 1991, No. 2, Item 62, in II-B THOMAS H. REYNOLDS & ARTURO A. FLORES, *Russia*, in *FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD* 1, 22 n.1 (2002).

² The Duma is the larger and more powerful body of the Russian Parliament. See II-B THOMAS H. REYNOLDS & ARTURO A. FLORES, *Russia*, in *FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD* 1, 17 (2002).

³ See Christopher Lehmann, *Introduction to UGOLOVNO-PROTSESSUAL'NYI KODEKS RF [UPK RF]* (Russ). (Dep't of Justice trans). (forthcoming 2004) (manuscript at 6-7, on file with author).

⁴ "Glasnost," which means "openness," refers to the series of radical reforms ushered in by President Gorbachev in the late 1980s. THOMAS F. REMINGTON, *POLITICS IN RUSSIA* 40 (2d ed. 2002).

⁵ UGOLOVNO-PROTSESSUAL'NYI KODEKS RSFSR [UPK RSFSR] (1960) (amended 1972) (Russ.), in *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES* 203 (Harold J. Berman & James W. Spindler trans., 1972).

⁶ REYNOLDS & FLORES, *supra* note 2, at 8-9, 16-17.

⁷ RUSS. CONST., reprinted in *RUSSIAN LEGAL TEXTS: THE FOUNDATIONS OF A RULE-OF-LAW STATE AND A MARKET ECONOMY* 1 (William E. Butler & Jane E. Henderson eds., 1998).

⁸ Leon Aron, *Russia Reinvents the Rule of Law*, *RUSSIAN OUTLOOK*, Mar. 20, 2002, at 9; Scott Boylan, *Rule of Law in the Criminal Sphere: Long Awaited Russian Criminal Procedure Code is Enacted*, 7 *RUSSIA WATCH* 10, 10 (2002), available at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Russia_Watch_7.pdf.

liberal provisions of the 1993 Constitution.⁹

More specifically, the CCP has dramatically altered the roles of procurators, judges, and defense attorneys in the Russian criminal justice system,¹⁰ converting the previous inquisitorial method of criminal procedure into a more adversarial process.¹¹ The CCP greatly diminishes the almost absolute power previously held by the procuracy,¹² transfers a substantial amount of power to the courts, and creates a significantly expanded role for defense attorneys.¹³

Although the passage of the CCP represents a revolution in Russian criminal procedure jurisprudence,¹⁴ the scholarly discussion of the CCP has been confined to a comparison of some of the most liberal provisions of the CCP with their American counterparts¹⁵ and a case study of the jury trial initiative in Sakhalin.¹⁶ Due to the large number of significant reforms of the Russian criminal justice system that the CCP envisions, a critical analysis of the success of the implementation of the entire CCP is

⁹ Lehmann, *supra* note 3, at 6; Boylan, *supra* note 8, at 10. See, e.g., RUSS. CONST. arts. 22(2) (authorizing arrests and detentions only upon court order and limiting detentions without a court order to 48 hours), 23(2) (authorizing the violation of the privacy of correspondence only upon court order), 25 (authorizing the search of private residences only pursuant to instances established by federal law or a court order), 46(1) (right to defend rights and liberties in court), 48 (right to counsel), 49(1) (innocent until proven guilty), 50(1) (no double jeopardy), 51(1) (no self-incrimination), 120(1) (independence of judges), 121(1) (judges irremovable), 122(1) (judicial immunity from prosecution), 123 (adversarial proceedings and jury trials), & 124 (funding of courts from the federal budget).

¹⁰ See Aron, *supra* note 8, at 10 (discussing how key provisions of the CCP increase the power of the judiciary and decrease the power of the procuracy).

¹¹ See *id.* at 11.

¹² The term "procuracy" refers to Russian prosecutors. Peter H. Solomon, Jr. & Todd S. Foglesong, *The Procuracy and the Courts in Russia: A New Relationship?*, 9 E. EUR. CONST. REV., 105, 105 (2000).

¹³ See Aron, *supra* note 8, at 11.

¹⁴ See Lehmann, *supra* note 3, at 6.

¹⁵ See Leonard Orland, *A Russian Legal Revolution: The 2002 Criminal Procedure Code*, 18 CONN. J. INT'L L. 133 (2002).

¹⁶ See Paul J. De Muniz, *Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 81 (2004) [hereinafter De Muniz, *Judicial Reform in Russia*]; Paul J. De Muniz, *Realizing the Rule of Law: Jury Trials Come to the Russian Far East*, 63 OR. ST. B. BULL., Feb./Mar. 2003, at 11 [hereinafter De Muniz, *Realizing the Rule of Law*].

beyond the scope of this Comment. Instead, this Comment will focus upon the narrower question of how effectively the CCP has reallocated power among procurators, judges, and defense attorneys during the two years following its implementation.¹⁷

First, this Comment examines the roles of procurators, judges, and defense attorneys in the Soviet criminal justice system and how their roles began to change after the collapse of communism. Second, this Comment sets out the guiding principles behind the promulgation of the CCP and discusses how the relevant CCP provisions have the potential to dramatically alter the powers and duties of procurators, judges, and defense attorneys in today's criminal justice process. Third, this Comment critically analyzes how effectively these new provisions have been implemented, highlighting both victories and shortcomings. Finally, in light of those victories and shortcomings, this Comment determines the current success and the potential for continued and increased efficacy in reaching a fair distribution of power among procurators, judges, and defense attorneys in the Russian criminal justice system.

II. Background

A. Criminal Procedure in the Soviet Union

Like everything else in the Soviet Union, the judicial system was a political tool of the Communist Party, and the justice meted out was the justice authorized by the Communist Party.¹⁸ Following the 1917 Revolution, the Bolsheviks refused to use tsarist legal officials in their legal system and, instead, staffed their legal agencies with politically affiliated amateurs.¹⁹ When this arrangement failed to produce a pliant, reliable cadre of legal officials, the Communist Party insisted not only that legal officials obtain Party membership, but also that they pursue government-

¹⁷ *Russia's Putin Signs Law on Amendments to Criminal Code*, BBC MONITORING, July 6, 2003, available at 2003 WL 58752857 (stating that the CCP went into effect on July 1, 2002).

¹⁸ See Aron, *supra* note 8, at 1; Boylan, *supra* note 8, at 10 ("[T]he old . . . Soviet procedure code . . . was . . . to facilitate the authoritarian power of one of the most tyrannical regimes in the history of the world.").

¹⁹ PETER H. SOLOMON, JR., *SOVIET CRIMINAL JUSTICE UNDER STALIN* 4 (1996).

controlled legal education and careers in legal service.²⁰ As a result of this endless political indoctrination, local Party politicians were able to intervene in all areas of the criminal justice system in order to serve the regime's, as well as their own personal, needs.²¹

The distribution of power in the Soviet criminal justice system was skewed drastically in favor of the procuracy.²² Considered the most prestigious members of the legal profession, the procurators possessed vast powers far superior to that of U.S. prosecutors²³ and belonged to the political elite, wielding significantly more political power than judges and defense attorneys.²⁴ Procurator duties included: (1) supervising the entire justice system; (2) upholding the rights of both the state *and* individuals accused of a crime; (3) investigating crimes; and (4) prosecuting crimes.²⁵

Outside of the courtroom, the procuracy functioned as the principal check on official illegality and abuses of power.²⁶ *The Law on the Procuracy of the USSR*²⁷ entrusted the procuracy with supreme supervision over the uniform execution of the laws by all entities and persons in the Soviet Union.²⁸ In fact, the procurator's power to monitor official compliance with the law and the Party line even allowed him to monitor judicial conduct.²⁹ Through his power of "general supervision," the procurator monitored the production of laws issued by lower levels of government and received, processed, and investigated citizen complaints.³⁰ In addition, procurators were responsible for monitoring both the

²⁰ *Id.*

²¹ *Id.* at 5.

²² See THOMAS F. REMINGTON, *POLITICS IN RUSSIA* 211 (1st ed. 1999); see also Solomon & Foglesong, *supra* note 12, at 105-06 (detailing the reasons for the superior position of the procuracy in the Soviet criminal justice system).

²³ REMINGTON, *supra* note 22, at 211.

²⁴ Solomon & Foglesong, *supra* note 12, at 106.

²⁵ REMINGTON, *supra* note 22, at 206; Aron, *supra* note 8, at 2.

²⁶ REMINGTON, *supra* note 22, at 211.

²⁷ Law on the Procuracy of the USSR, Vedomosti SSSR, 1979, No. 49, Item 843, amended by Vedomosti SSSR, 1982, No. 49, Item 935, in *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 173 (W.E. Butler ed. & trans., 1983).

²⁸ *Id.* art. 1.

²⁹ Aron, *supra* note 8, at 2.

³⁰ Law on the Procuracy of the USSR, art. 3; Solomon & Foglesong, *supra* note 12, at 105.

police and the penal system³¹ and for reviewing the work of the investigators who prepared criminal case files.³² Procurators also had unchecked powers over arrest, search and seizure, and pretrial detention.³³

Moreover, the vast powers and political prestige of the procuracy significantly influenced the conduct of Soviet criminal trials.³⁴ The Soviet criminal justice system was based upon the inquisitorial (or Continental) model adopted in tsarist Russia.³⁵ In this model, a judge actively sought to determine the truth in a particular case based upon an oral review of the evidence contained in a written case file.³⁶ A neutral judicial investigator, similar to the *juge d'instruction* in France, conducted the initial pretrial investigation, including both inculcating and exculpating evidence in the case file for the judge's review.³⁷ But the Soviet model skewed this process in favor of the prosecution, because the investigators were officials of the procuracy rather than of the courts.³⁸ Working under the direct supervision of the procurators, investigators could not maintain their independence and neutrality and, hence, conducted pretrial investigations and compiled case files in such a way so as to assist the procurators in convicting defendants.³⁹ As a result, the courts, judges, and defense attorneys constituted a mere backdrop to the procurator's virtually inevitable conviction of the defendant.⁴⁰

After assigning a criminal case to a judge, the procurator often failed to appear at trial, because he trusted that the judge would

³¹ Law on the Procuracy of the USSR, art. 3; REMINGTON, *supra* note 22, at 211; Solomon & Foglesong, *supra* note 12, at 105.

³² PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 144 (2000).

³³ Aron, *supra* note 8, at 2; Solomon & Foglesong, *supra* note 12, at 105.

³⁴ See Aron, *supra* note 8, at 2.

³⁵ REMINGTON, *supra* note 22, at 212 note 13; SOLOMON & FOGLESONG, *supra* note 32, at 142-43.

³⁶ REMINGTON, *supra* note 22, at 212 note 13; SOLOMON & FOGLESONG, *supra* note 32, at 142-43.

³⁷ SOLOMON & FOGLESONG, *supra* note 32, at 142-43.

³⁸ *Id.* at 143.

³⁹ *Id.* at 143-44.

⁴⁰ See Aron, *supra* note 8, at 2.

find the defendant guilty.⁴¹ If the judge determined that the evidence was unusually weak, he returned the case to the procurator for supplementary investigation (*dosledovanie*).⁴² After the completion of such additional investigation, the defendant stood trial for the same crime.⁴³ In addition, as a part of his supervisory responsibilities, the procurator had the right to review the legality of any decision, verdict, or sentence that had entered into legal effect, including an acquittal.⁴⁴ This supervisory power had two effects: first, it resulted in an acquittal rate of less than one percent of all verdicts,⁴⁵ and second, it gave procurators the power to have sentences they considered too lenient rescinded and replaced with harsher punishments.⁴⁶ As a result, the procurators dominated courtroom proceedings by controlling both the information provided in the case files and the appellate process, thus placing judges and defense attorneys in an extremely subservient and dependent position.⁴⁷

In direct contrast to the vast powers possessed by the procuracy, the power of the Soviet judiciary was virtually non-existent.⁴⁸ Although members of the Communist Party, Soviet

⁴¹ *Id.*; see Orland, *supra* note 15, at 145.

⁴² Aron, *supra* note 8, at 2.

⁴³ *Id.*

⁴⁴ Law on the Procuracy of the USSR, *Vedomosti SSSR*, 1979, No. 49, Item 843, art. 33, *amended by* *Vedomosti SSSR*, 1982, No. 49, Item 945, in *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 173 (W.E. Butler ed. & trans., 1983) ("The right to bring cassational and private protests against illegal and unfounded decisions, judgments, rulings, and decrees shall belong to the procurator and deputy procurator within the limits of their competence irrespective of their participation in the examination of the case in the court of first instance."); Solomon & Foglesong, *supra* note 12, at 106.

⁴⁵ See Solomon & Foglesong, *supra* note 12, at 106 (discussing how acquittal rates dropped from 10% to 2-3% in the late 1940s and then eventually to a fraction of 1% in the 1960s).

⁴⁶ Elena Barikhnovskaya, *How the Constitutional Court is Reforming Criminal Procedure: The Nikitin Case*, 9 E. EUR. CONST. REV. 99, 101 (2000) (discussing how high-level procurators can submit a "protest" to certain high courts requesting the reversal of an acquittal or a criminal sentence which they consider too lenient); *cf.* Aron, *supra* note 8, at 2 (describing the 1960s Rokotov-Faibishenko case, in which Secretary Khrushchev had the law changed so that the death penalty applied to currency crimes, resulting in the re-sentencing and execution of two defendants).

⁴⁷ See Solomon & Foglesong, *supra* note 12, at 106.

⁴⁸ See REMINGTON, *supra* note 22, at 213.

judges did not enjoy the elevated status and power of the procurators.⁴⁹ In fact, judges generally had the least experience and were the lowest-paid officials in the legal profession.⁵⁰ Due to their disfavored status, Soviet judges lacked the political standing to play a meaningful role in the criminal justice process.⁵¹

Soviet judges remained in a position of subservience because of inadequate financing, insecure tenure, and a lack of control over the administration of the courts.⁵² Judicial salaries were "barely adequate" and judges rarely received substantial non-monetary perks, an important salary supplement in the communist system.⁵³ The local Party apparatus determined a judge's tenure in office by recommending or not recommending the judge in a single-candidate election.⁵⁴ Party officials based judicial retention decisions on a judge's "stability of sentences."⁵⁵ Frequent reversals could result in a judge not being reelected or promoted, or even in disciplinary proceedings.⁵⁶ In addition, judges exercised little control over the administration of the courts; instead, the Ministry of Justice controlled court budgets and wrote the performance evaluations that determined a judge's chances for career advancement.⁵⁷

As a result, Soviet judges became the mere puppets of the local

⁴⁹ Solomon & Foglesong, *supra* note 12, at 106.

⁵⁰ REMINGTON, *supra* note 22, at 213; *see also* Aron, *supra* note 8, at 1-2 (stating that most Soviet judges in the 1970s and 1980s could not afford their own apartments, living instead with their family in a single room in a communal apartment or dormitory).

⁵¹ *See* Solomon & Foglesong, *supra* note 12, at 106.

⁵² *See* Peter H. Solomon, Jr., *Judicial Power in Russia: Through the Prism of Administrative Justice*, 38 L. & SOC'Y REV. 549, 549 (2004) (emphasizing that these three factors constitute the basis of an independent judiciary) [hereinafter Solomon, *Judicial Power in Russia*]; Peter H. Solomon, Jr., *Putin's Judicial Reform: Making Judges Accountable as Well as Independent*, 11 E. EUR. CONST. REV., 117, 118 (2002) (highlighting these three factors as institutional mechanisms developed by democratic governments to insulate judges from outside influences) [hereinafter Solomon, *Putin's Judicial Reform*].

⁵³ SOLOMON & FOGLESONG, *supra* note 32, at 7.

⁵⁴ Aron, *supra* note 8, at 1.

⁵⁵ SOLOMON & FOGLESONG, *supra* note 32, at 7.

⁵⁶ *Id.* (discussing how reversal ratings weighed heavily in the performance ratings, possible bonuses, reputations, and future careers of Soviet judges).

⁵⁷ *Id.* (describing the derelict condition of the Soviet court buildings and how funds barely paid for staff needs).

Party apparatus, subservient to the demands of the local Party elite.⁵⁸ Because the judges depended upon the local Party bosses for the financial support of the courts, non-monetary perks, and career advancement, they assumed an extremely passive role in the criminal justice system, acceding to the demands of the politically powerful procurators.⁵⁹ For example, during criminal trials, Soviet judges cooperated with the procurators to obtain convictions,⁶⁰ assuming the role of assistant prosecutors rather than neutral arbiters of the law.⁶¹ This contributed to the aforementioned low acquittal rate⁶² and diminished judicial self-esteem and competence.⁶³

Soviet defense counsel, known as advocates (*advokatura*), shared the lowly status of Soviet judges in the criminal justice system.⁶⁴ Advocates also maintained Party membership and were controlled by the Ministry of Justice.⁶⁵ Defense attorneys had no right to be involved in the pretrial investigation of their clients' cases, could not conduct their own parallel investigations, and had no access to the case file until after the conclusion of the preliminary investigation.⁶⁶ The defense attorneys' lack of autonomy and pretrial investigation rights significantly impaired their ability to effectively represent their clients in criminal proceedings and, like Soviet judges, rendered them mere accessories to the procurator's inevitable conviction of the defendant.⁶⁷

Consequently, the criminal justice system in the Soviet Union operated merely as another instrument of Communist Party

⁵⁸ See Solomon & Foglesong, *supra* note 12, at 106.

⁵⁹ *Id.*

⁶⁰ See *id.* (describing judicial cooperation in politically sensitive cases, in which judges acted in a biased manner during the trial and always returned the verdicts and sentences that would satisfy the KGB).

⁶¹ See REMINGTON, *supra* note 22, at 215.

⁶² Solomon & Foglesong, *supra* note 12, at 106.

⁶³ See REMINGTON, *supra* note 22, at 213.

⁶⁴ See *id.* at 220.

⁶⁵ *Id.*

⁶⁶ SOLOMON & FOGLESONG, *supra* note 32, at 144.

⁶⁷ See REMINGTON, *supra* note 22, at 220.

control.⁶⁸ Criminal trials produced little more than sham justice, because Soviet judges almost always deferred to the wishes of the powerful procurators, whose power to convict was virtually unchecked.⁶⁹ Defendants enjoyed no presumption of innocence and no protection from double jeopardy, as defendants could stand trial for the same charges multiple times until they were convicted.⁷⁰ In addition, defendants possessed only a right to Party-controlled counsel and, therefore, defense attorneys played no significant adversarial role in the Soviet criminal process.⁷¹ The cultural legacy of the Soviet criminal justice system consisted of an unequal power distribution among judicial actors⁷² and a societal perception that courts were not the protectors of individual rights.⁷³

B. Criminal Procedure in the Russian Federation

President Mikhail Gorbachev's introduction of *glasnost* in the late 1980s exposed the unfairness and impotence that characterized the entire Soviet criminal justice system, stimulating governmental interest in developing procedural reforms for the justice system.⁷⁴ As a result, two major advances in Russian legal jurisprudence occurred in 1991.⁷⁵ First, the legislature passed a law creating the Constitutional Court of the Russian Federation, a judicial entity autonomous from the control of the executive and legislative branches.⁷⁶ The Constitutional Court had the authority to rule on the constitutionality of international treaties, laws of Russia's republics, federal laws, and the laws, codes, and regulations governing the legal system.⁷⁷ Second, nine Russian

⁶⁸ See Aron, *supra* note 8, at 1.

⁶⁹ See *id.* at 2.

⁷⁰ See *id.*

⁷¹ See REMINGTON, *supra* note 22, at 220.

⁷² Solomon & Foglesong, *supra* note 12, at 105.

⁷³ REMINGTON, *supra* note 22, at 214.

⁷⁴ Aron, *supra* note 8, at 2-3; Solomon & Foglesong, *supra* note 12, at 106.

⁷⁵ See Aron, *supra* note 8, at 3.

⁷⁶ *Id.* Although the Constitutional Court constitutes a very interesting component of the current Russian legal system, an in-depth analysis of its composition, function, and efficacy is beyond the scope of this Comment.

⁷⁷ *Id.*

jurists⁷⁸ wrote a 100-page manifesto entitled *The Conception of Judicial Reform in the Russian Federation*,⁷⁹ which the Supreme Soviet of Russia⁸⁰ adopted as the blueprint for a comprehensive and radical reform of the post-communist legal system.⁸¹ The authors advocated for a reallocation of the distribution of power in the criminal justice system between the procurators and the judges in order to eliminate the courts' traditional deference to procurators and dependence on the state.⁸² More importantly, the manifesto proposed specific changes to the current system⁸³ which would dramatically reduce the power of the procuracy.⁸⁴

But most jurists and politicians, and especially the procurators themselves, did not share the views expressed by the authors of the *Conception* and the procuracy largely succeeded in safeguarding its powers of general supervision.⁸⁵ Procurators retained the power to review "the rights and freedoms of the person and the citizen" and the implementation of laws.⁸⁶ But procuratorial supervision has since been limited to officials and state agencies, and procurators no longer have the express power to supervise the

⁷⁸ The jurists consisted of lawyers and legal scholars, who were largely specialists in criminal procedure. Solomon & Foglesong, *supra* note 12, at 106.

⁷⁹ *The Conception of Judicial Reform in the RSFSR*, 30 STATUTES AND DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES 9 (1994).

⁸⁰ The Supreme Soviet was the legislative body of the Soviet government, both during the height of communist power and during the transitional period under President Gorbachev. David MacKenzie & Michael W. Curran, *A History of Russia, the Soviet Union, and Beyond* 611 (5th ed. 1999).

⁸¹ Aron, *supra* note 8, at 3; Solomon & Foglesong, *supra* note 12, at 106.

⁸² Aron, *supra* note 8, at 3; Solomon & Foglesong, *supra* note 12, at 106.

⁸³ See Aron, *supra* note 8, at 3 (calling for life tenure of judges, disciplinary and removal power over judges to rest with peer associations, payment of judicial salaries from the federal budget, guaranteed housing and health care for judges, judicial review of administrative acts, judicial rather than procuratorial assurance of trial legality, and exclusive judicial authorization of pretrial detention, wiretapping, and search and seizure).

⁸⁴ *Id.*; Solomon & Foglesong, *supra* note 12, at 106.

⁸⁵ Solomon & Foglesong, *supra* note 12, at 106; see also Boylan, *supra* note 8, at 11 (noting that the procurators opposed the recommended reforms because they would dramatically reduce the power of procurators and police to deal with rising crime levels as efficiently as in the past).

⁸⁶ Solomon & Foglesong, *supra* note 12, at 107.

legality of criminal trials.⁸⁷ Although the 1992 *Law on the Procuracy of the Russian Federation*⁸⁸ does not refer to the procurator's responsibility to supervise the execution of the law at trial,⁸⁹ superiors still expect procurators to utilize all legal means to ensure compliance with the law.⁹⁰ In addition, procurators retained their powers of supplementary investigation and the right to review any verdict already in effect.⁹¹

Despite the procuracy's stubborn resistance to liberal reforms, the 1993 Constitution, ratified during the Yeltsin administration, contains a number of liberal legal provisions that redistribute many of the procuracy's former duties to the judiciary in law, if not in practice.⁹² Significantly, the Constitution states that procurators must seek judicial approval before eavesdropping, initiating pretrial detention, and conducting searches and seizures.⁹³ However, these provisions remained ineffective for nearly a decade until the new CCP came into effect on July 1, 2002.⁹⁴ The provisions of the 1993 Constitution make judges irremovable and independent, dictate that court funding is to be obtained solely from the federal budget, and declare that trial

⁸⁷ *Id.*

⁸⁸ Federal Law on the Procuracy of the Russian Federation, Vedomosti Fed. Sobr. RF, 1992, No. 8, Item 366, *amended by* Sobr. Zakonod. RF, 1995, No. 47, Item 4472, in RUSSIAN LEGAL TEXTS: THE FOUNDATIONS OF A RULE-OF-LAW STATE AND A MARKET ECONOMY (William E. Butler & Jane E. Henderson eds., 1998) [hereinafter Federal Law on the Procuracy of the Russian Federation].

⁸⁹ Compare Law on the Procuracy of the USSR, Vedomosti SSSR, 1979, No. 49, Item 843, art. 3, *amended by* Vedomosti SSSR, 1982, No. 49, Item 945, in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 173 (W.E. Butler ed. & trans., 1983) ("The Procuracy of the USSR shall . . . function according to the following basic orientations: . . . supervision over the execution of laws when cases are considered in courts . . ."), with Federal Law on the Procuracy of the Russian Federation, art. 21 (noting the absence of a provision regarding the supervision of the execution of laws when cases are considered in court).

⁹⁰ Solomon & Foglesong, *supra* note 12, at 107 (referring to Order No. 44 of 1994 from the Procurator General, which states that the absence of the duty to supervise legality in trials "in no way means that the procurator show indifference to actual violations of the law"). Procurators are supposed to petition the judge and/or make cassational protests if they observe any violations of the law. *Id.*

⁹¹ *Id.*

⁹² See *id.*; RUSS. CONST., *supra* note 7.

⁹³ Solomon & Foglesong, *supra* note 12, at 107.

⁹⁴ *Id.*

proceedings are competitions between equal players, thus securing significant victories for both judges and defense attorneys.⁹⁵

Furthermore, beginning with the 1992 *Law on the Status of Judges in the Russian Federation*,⁹⁶ the government began to pass a series of laws that addressed the funding, tenure, and control issues that undermined the independence of the judiciary during the Soviet period.⁹⁷ First, judicial salaries increased to several hundred dollars per month, comparable to that of middle rank government officials, and the quality of non-monetary benefits packages improved.⁹⁸ But judicial salaries remained low compared to the salaries of Western judges and other Russian professionals,⁹⁹ and the severe financial fluctuations of the 1990s made it difficult for courts to obtain the promised federal funding, forcing courts to turn to local governments for supplementary funding.¹⁰⁰ As a result, judges remained susceptible to control and pressure by local authorities and politicians.¹⁰¹

Second, a series of laws began to eliminate judicial concerns with tenure and career advancement.¹⁰² Most judges in Russia now hold office for life until they reach a mandatory retirement age.¹⁰³ In addition, regional conferences of judges (*collegia*) have assumed many of the judicial regulatory powers previously exercised by the executive or legislative branches of government

⁹⁵ See Aron, *supra* note 8, at 3-4.

⁹⁶ Law on the Status of Judges in the Russian Federation, Vedomosti RSFSR, 1992, No. 30, Item 1792, *amended by* Sobr. Zakonod. RF, 1995, No. 26, Item 23991, in RUSSIAN LEGAL TEXTS: THE FOUNDATIONS OF A RULE-OF-LAW STATE AND A MARKET ECONOMY 234 (William E. Butler & Jane E. Henderson eds., 1998).

⁹⁷ See Aron, *supra* note 8, at 4.

⁹⁸ *Id.* at 5 (adding that compensation packages now included access to apartments as well as health and child care).

⁹⁹ *Id.* (stating that although judicial salaries increased, judicial salaries were only comparable to the salaries of middle-rank government employees).

¹⁰⁰ *Id.*; Solomon & Foglesong, *supra* note 12, at 107.

¹⁰¹ Aron, *supra* note 8, at 5.

¹⁰² See *id.* at 4; Solomon & Foglesong, *supra* note 12, at 107.

¹⁰³ Aron, *supra* note 8, at 4 (noting that life tenure begins after judges successfully complete a probationary period, which is ten years in length for judges appointed in 1992 and 1993 and three years for judges appointed after 1995); Solomon & Foglesong, *supra* note 12, at 107. By 1998, almost 25% of Russian judges enjoyed life tenure. Aron, *supra* note 8, at 4.

and perform many self-regulatory functions.¹⁰⁴ The judicial *collegias* elect regional councils of judges, nominate delegates to attend the national Congress of Judges, and establish judicial qualifications *collegias* (JQCs).¹⁰⁵ Only the JQCs can remove a judge's immunity from recall, dismissal, or prosecution, and the Russian President may appoint district and regional judges only after the JQCs and the Supreme Court have examined and endorsed the nominees.¹⁰⁶

Third, the Judicial Department of the Supreme Court, an entity wholly separate from the Ministry of Justice, now controls the administration and management of the Russian court system.¹⁰⁷ The Judicial Department manages and distributes government funding to the courts.¹⁰⁸ In addition, the total separation of the Judicial Department from the executive branch has greatly enhanced judicial autonomy and independence.¹⁰⁹

The flurry of legal reforms in the 1990s brought mixed results.¹¹⁰ Although the acquittal rate did not increase, the number of cases lost by the State increased modestly.¹¹¹ Moreover, judges increasingly returned cases to the procurators for further investigation and even terminated certain trials for various reasons.¹¹² In addition, a 1999 ruling by the Constitutional Court narrowed the grounds for conducting a supplemental investigation by permitting supplemental investigations only if the procedural laws governing pretrial investigation were violated.¹¹³ The reasons for the decrease in successful prosecutions were twofold: first, ill-qualified procurators failed to adequately prepare cases before sending them to trial, and second, judges began to take bolder actions in the courtroom.¹¹⁴

¹⁰⁴ Aron, *supra* note 8, at 4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; Soloman & Foglesong, *supra* note 12, at 107.

¹⁰⁸ Solomon & Foglesong, *supra* note 12, at 107.

¹⁰⁹ Aron, *supra* note 8, at 4.

¹¹⁰ See Solomon & Foglesong, *supra* note 12, at 107-08.

¹¹¹ *Id.* (noting that the acquittal rate remained below 1%).

¹¹² *Id.*

¹¹³ Aron, *supra* note 8, at 7; see SOLOMON & FOGLESONG, *supra* note 32, at 150.

¹¹⁴ Solomon & Foglesong, *supra* note 12, at 108.

Despite these tentative steps towards a more equitable and adversarial legal system, the Russian criminal process remained procurator-centered.¹¹⁵ Many judges continued to view their role in the criminal justice system as procuratorial adjuncts in the fight against crime.¹¹⁶ Due to the erratic availability of federal funding throughout the 1990s, many courts remained subservient to the whims of local political authorities in order to obtain the supplemental funding they needed to carry out their duties.¹¹⁷ Although several of the provisions of the 1993 Constitution and many of the proposed legal reforms threatened to curtail the power of the procuracy, the procurators still managed to preserve most of their vast powers of investigation, prosecution, and supervision of the laws.¹¹⁸ Despite their incomplete implementation, the reforms of the 1990s had begun to break down the old Soviet criminal justice system and replace it with a more Westernized, adversarial model. These reforms paved the way for President Vladimir Putin's ambitious agenda of radical legal reforms in 2001.¹¹⁹

III. The Russian Federation Code of Criminal Procedure

A. Goals of the New CCP

As stated earlier, Duma deputies drafted the CCP to replace the antiquated Soviet version that dated back to the 1960s.¹²⁰ The provisions of the new CCP theoretically bring the law of criminal procedure into compliance with the 1993 Constitution, eliminating the prior inconsistencies between rights guaranteed in the Constitution and the actual operation of the old Soviet criminal justice system.¹²¹ Upholding the CCP as the "cornerstone" of judicial reform in Russia,¹²² the drafters of the CCP sought to

¹¹⁵ See *id.*

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.* at 107.

¹¹⁹ See Aron, *supra* note 8, at 9-10.

¹²⁰ See REYNOLDS & FLORES, *supra* note 2, at 17.

¹²¹ See Aron, *supra* note 8, at 9.

¹²² Ivan Novikov, *Duma Works Out Code of Criminal Procedure*, ITAR TASS, Feb. 28, 2001 (quoting Yelena Mizulina, Deputy Chairperson of the Duma Committee on Law), available at 2001 WL 14768054; see also Orland, *supra* note 15, at 134 ("The

reconstruct the Russian judicial system to function more like its Western European and U.S. counterparts.¹²³ Prominent among the goals of the CCP is a desire to elevate the interests of the individual above the interests of the state, a wholly new concept in Russian juridical thinking.¹²⁴ Similarly, the drafters intended for the CCP to guarantee individuals a fairer trial, in part by forcing investigators and prosecutors to professionalize the investigative process to include the gathering of authentic, legally obtained evidence.¹²⁵ In short, the CCP focuses on protecting the innocent from erroneous or harassing criminal charges, thus operating in stark contrast to the *Soviet Code of Criminal Procedure's* prior focus on securing convictions and maintaining authority.¹²⁶

B. Specific CCP Provisions Reallocate Power Among Judges, Procurators, and Defense Attorneys

1. Definitions

Article 5 sets out the definitions of a number of important

Code is 'the most important reform in Russia since the great reform of 1864.'") (quoting Ambassador Vershbow, Opening Remarks at the All Russia Academic Conference on Implementation of the Criminal Procedure Code of the Russian Federation (Feb. 4, 2002)).

¹²³ See Judith Ingram, *New Laws Expand Rights in Russia*, DESERET NEWS, July 1, 2002, at A4 ("The goal of this reform is to finally rid ourselves of the atavistic Soviet juridical machine and maximally approach Western-standard legal procedure."); Steven Lee Myers, *Russia Glances to the West for Its New Code*, N.Y. TIMES, July 1, 2002, at A1, A6 (quoting Dmitri Kozak, President Putin's Deputy Chief of Staff and the head of the group who drafted the CCP, as saying, "[A]s of July 1, we will have a criminal procedure that corresponds to that of world standards and of civilized countries.").

¹²⁴ See Myers, *supra* note 123, at A6 (quoting Dmitri Kozak as saying, "[W]e have made a big step in placing the interests of the individual higher than the interests of the state.").

¹²⁵ Ana Uzelac, *Deputies Vote to Revamp Courts*, MOSCOW TIMES, June 21, 2001, at 1, available at <http://www.themoscowtimes.com/stories/2001/01/23/003.html>. Yet critics emphasize several parts of the CCP which continue to favor procurators over defense attorneys: (1) procurators are treated more favorably in the presentation of evidence; (2) investigators have the right to appoint counsel for indigent defendants; and (3) procurators can commission evaluations by third-party experts at their own initiative, whereas defense attorneys cannot do so without the permission of the investigator or the court. Natalia Yefimova, *Court System Gets New Kind of Justice*, MOSCOW TIMES, July 1, 2002, available at <http://www.cdi.org/russia/johnson/6332-6.cfm>.

¹²⁶ See Maksim Chernigovsky, *The New Criminal Code Must Be Honored: It Takes Effect on July 1*, KOMMERSANT, July 1, 2002, at 1-2.

terms used throughout the CCP.¹²⁷ The CCP defines a “procurator” as “the Procurator General of the Russian Federation and procurators subordinate to him, their deputies and other officials of procuracy agencies who take part in criminal proceedings and have the powers vested in them by the Federal Law of the Procuracy.”¹²⁸ A “judge” is “an official authorized to administer justice”¹²⁹ and a “presiding judge” is “a judge who hears a criminal case alone or the judge during the hearing of a criminal case by a multi-member court who controls the court proceedings.”¹³⁰ The term “defense counsel” is defined not in Article 5, but Article 49, and is “a person who, in accordance with the procedures established by this Code, defends the rights and interests of suspects and accuseds and provides legal assistance to them in the course of criminal proceedings.”¹³¹ Thus, the drafters of the CCP sought to identify the major participants in the criminal procedure process by defining their positions at the beginning of the CCP.¹³²

2. *Defense Counsel*

The CCP revolutionizes the role of defense counsel in Russian criminal procedure. First, Article 16 guarantees a suspect or accused the right to a defense and to defense counsel, even if the individual cannot afford to pay for counsel.¹³³ The CCP also declares that defense counsel and procurators possess equal rights before the courts,¹³⁴ representing a substantial increase in the power of defense counsel and a sharp decrease in procuratorial power. As further evidence of this reallocation of power, Articles 53 and 86 give defense counsel the right to collect evidence and conduct pretrial investigation *personally*.¹³⁵ Under the old Soviet

¹²⁷ UPK RF art. 5.

¹²⁸ *Id.* art. 5(31).

¹²⁹ *Id.* art. 5(54).

¹³⁰ *Id.* art. 5(26).

¹³¹ *Id.* art. 49(1).

¹³² *See id.* arts. 5 & 49.

¹³³ *Id.* art. 16.

¹³⁴ *Id.* art. 15(4).

¹³⁵ *Id.* arts. 53(1) (permitting defense counsel to gather and present the evidence necessary to provide legal representation, and to examine and copy the entire criminal

criminal justice system, defense counsel were merely permitted to "study" the criminal case file prepared by the procuracy at the conclusion of the pretrial investigation.¹³⁶ In addition, the CCP does not require defense counsel to possess any special qualifications or clearance to participate in cases involving state secrets; instead, defense attorneys need only sign a non-disclosure agreement.¹³⁷

3. *Adversarial Proceedings*

Whereas the procurator dominated criminal trials in the Soviet system,¹³⁸ the CCP mandates that judicial proceedings be adversarial competitions between equals.¹³⁹ Separate and distinct individuals must undertake the prosecution, defense, and adjudication of a criminal case, so that a single agency or official does not control all three functions.¹⁴⁰ The CCP explicitly states that judges are no longer instruments of criminal prosecution and forbids the judge from siding with either the prosecution or the defense.¹⁴¹ Instead, judges are to remain neutral arbiters of the proceedings,¹⁴² ensuring that the necessary conditions exist for procurators and defense attorneys to exercise their duties and rights in an adversarial context.¹⁴³ The CCP also mandates that the

case file upon completion of an inquiry or preliminary investigation) & 86(3) (granting defense counsel the right to obtain documents and objects, to interview consenting individuals, and to request documents and memoranda from governmental and non-governmental agencies and associations).

¹³⁶ Aron, *supra* note 8, at 11.

¹³⁷ See UPK RF art. 49(5).

¹³⁸ See Aron, *supra* note 8, at 2.

¹³⁹ UPK RF art. 15(1, 4) ("Уголовное судопроизводство осуществляется на основе состязательности сторон."). The translation of the term "*sudoproizvodstvo*" (судопроизводство) in Article 15(1) is problematic, however, because it is unclear whether the requirement of adversarial procedures applies to the entire criminal process or just to court proceedings. Due to the fact that defense attorneys and procurators continue to possess unequal powers of investigation (despite the increased powers conferred upon defense counsel in Articles 53 and 86), the term has been translated in its more limited form to mean "judicial proceedings." *Id.* art. 15(1), n.10.

¹⁴⁰ *Id.* art. 15(2).

¹⁴¹ *Id.* art. 15(3).

¹⁴² Aron, *supra* note 8, at 11.

¹⁴³ UPK RF art. 15(3).

procurator be present in court at all times,¹⁴⁴ forcing procurators to prepare their cases more thoroughly and further separating the judge's role from that of the prosecution.¹⁴⁵ Thus, the CCP radically changes the roles of procurators, judges, and defense attorneys in the Russian criminal justice system, curtailing the pro-prosecution bias of the former Soviet system and replacing it with a more adversarial process of separate and equal players.¹⁴⁶

4. *Pretrial Investigation*

Under the 1979 *Law on the Procuracy of the USSR*, the Procurator General and his subordinate procurators possessed "supreme supervision over the precise and uniform execution of laws" by all government and other organizations and by all citizens.¹⁴⁷ That power of "general supervision" included the power to supervise the execution of the laws by inquiry agencies and preliminary investigation agencies, the power to coordinate the activities of law-protection agencies, and the duty to investigate crimes and bring to justice persons who have committed crimes.¹⁴⁸

The new CCP continues to vest a significant amount of control over the criminal investigation process in the procuracy rather than in an independent investigatory body.¹⁴⁹ In addition to his duty to pursue criminal prosecutions on behalf of the State, the procurator must also supervise the inquiries and preliminary investigations¹⁵⁰

¹⁴⁴ *Id.* art. 246(1-2).

¹⁴⁵ See Aron, *supra* note 8, at 11.

¹⁴⁶ See *id.*

¹⁴⁷ Law on the Procuracy of the USSR, Vedomosti SSSR, 1979, No. 49, Item 843, art. 1, amended by Vedomosti SSSR, 1982, No. 49, Item 945, in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 173 (W.E. Butler ed. & trans., 1983).

¹⁴⁸ *Id.* arts. 28-29.

¹⁴⁹ See UPK RF art. 37.

¹⁵⁰ Russian criminal procedure involves two types of investigation: an inquiry (*doznaniye*) and a preliminary investigation (*predvaritel'noye sledstviye*). *Id.* art. 5(6), n.6. Conducted by the police and/or inquiry officers, an inquiry is a short, simple investigation that occurs immediately after a crime. *Id.* An inquiry is the only form of investigation used for minor offenses and is the first step towards a full preliminary investigation for major offenses. *Id.* A professional investigator who possesses quasi-judicial powers conducts the more intensive preliminary investigations for more serious cases. *Id.* The differences between the two types of investigation are reflected in the distinction, albeit a subtle one, between inquiry officers and investigators in Russian

carried out by the respective agencies.¹⁵¹ Such supervision includes initiating criminal investigations, assigning cases to inquiry officers and investigators, personally taking part in investigations, and/or issuing binding written instructions to inquiry officers and investigators.¹⁵² Inquiry officers and investigators must obtain the consent of a procurator to initiate a case or to file any type of procedural motion in a court, and procurators alone possess the power to recuse and remove inquiry officers and investigators from a case.¹⁵³ Procurators may countermand the orders of inquiry officers and investigators, order agencies to take certain investigative actions, approve dismissal of a case, approve the issuance of an indictment, extend the period of pretrial investigation, and return the case to an agency for supplemental investigation.¹⁵⁴

Nevertheless, the CCP does give inquiry officers and investigators some autonomy from the procuracy. For example, all decisions affecting the execution and direction of an inquiry or investigation remain within the discretion of the inquiry officer or investigator, respectively, except when other CCP provisions require procuratorial authorization and/or a judicial warrant.¹⁵⁵ The CCP also addresses a potential conflict of interest by forbidding an inquiry officer involved in a current or former tactical investigative operation¹⁵⁶ related to the case to conduct a later inquiry of the same case.¹⁵⁷ When conducting a full preliminary investigation,¹⁵⁸ an investigator has the authority to initiate a criminal case and to determine the appropriate jurisdiction for the case.¹⁵⁹ It is important to note, however, that

criminal procedure. *Id.*

¹⁵¹ *Id.* art. 37(1).

¹⁵² *Id.* art. 37(2).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* arts. 38(2) & 41(3).

¹⁵⁶ Although beyond the scope of this Comment, a "tactical investigative operation" roughly coincides with American sting and undercover operations. For a more detailed discussion about these operations, see *id.* art. 89, n.31.

¹⁵⁷ *Id.* art. 41(2).

¹⁵⁸ See *supra* note 150.

¹⁵⁹ UPK RF art. 38(2).

the CCP gives the procurator the authority to resolve all disputes regarding investigative jurisdiction.¹⁶⁰ In addition, the investigator can issue binding orders to inquiry agencies to conduct certain investigative operations and can execute arrest warrants, subpoenas, and house arrests.¹⁶¹ Thus, although the new CCP more clearly defines the roles of inquiry officers and investigators in the criminal justice system, they remain instruments of the prosecution rather than an independent body of neutral information-gatherers.

5. Search and Seizure

The CCP drastically reduces the ability of the procuracy to conduct searches and seizures according to their own discretion,¹⁶² resulting in a decisive victory for Russia's legal reformers.¹⁶³ An inspection¹⁶⁴ of a dwelling may occur only upon the consent of the residents or pursuant to a *judicial* warrant, and a search and/or seizure within a dwelling may only occur pursuant to a *judicial* warrant.¹⁶⁵ Although an inspection, search, or seizure may be

¹⁶⁰ *Id.* art. 151(8).

¹⁶¹ *Id.* art. 38(2).

¹⁶² See Masha Gessen, *In Russia, Echoes of the Old KGB Going After Foreign Aid Workers and Others*, U.S. NEWS & WORLD REP., July 30, 2001, at 8 (stating that these articles were designed to "divest powers from Russia's prosecutors and invest it in the country's judiciary . . . by taking away from the prosecutors the right to issue . . . search warrants"). Compare Law on the Procuracy of the USSR, Vedomosti SSSR, 1979, No. 49, Item 843, art. 29, § 4, amended by Vedomosti SSSR, 1982, No. 49, Item 935, in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 173 (W.E. Butler ed. & trans., 1983) ("[T]he procurator shall, within the limits of his competence: . . . commission agencies of inquiry to execute decrees concerning . . . performance of a search, seizure, and search for persons who committed a crime . . ."), with UPK RF arts. 12 (sanctity of the home), 13 (confidentiality of correspondence, telephone and other conversations, and communications), 182 (grounds for a search), & 183 (grounds for a seizure).

¹⁶³ Aron, *supra* note 8, at 10.

¹⁶⁴ An inspection (*osmotr*) is a less intrusive search, generally involving a visual examination in which nothing is disturbed. UPK RF art. 12(1), n.7. Inspections may be combined with a more intrusive search (*obysk*) or seizure (*vyemka*). *Id.*

¹⁶⁵ *Id.* arts. 12(1-2) & 29(2). Although Article 29 does not specifically use the word "warrant," it explicitly states that only *courts* authorize the following: (1) pretrial detention; (2) extension of pretrial detention; (3) commitment of a suspect or accused for medical or psychiatric evaluation; (4) inspection of a dwelling without consent; (5) search and/or seizure in a dwelling; (6) search of a person; (7) seizure of financial information; (8) interception of correspondence; (9) attach property; (10) suspend a suspect or an accused from public office; and (11) wiretaps. When read in conjunction

conducted in exceptional circumstances without a judicial warrant, the investigator taking such an action must notify a procurator and a judge within twenty-four hours so that a judge may rule on the legality of the action.¹⁶⁶ Furthermore, the interception of a person's confidential telephone and other conversations, correspondence, and various methods of communication as well as the use of wiretaps is impermissible except pursuant to a *judicial* warrant.¹⁶⁷

According to the CCP, grounds for conducting a search require "sufficient information to believe that the instruments of a crime or objects, documents, or valuables that may be relevant to a criminal case may be located at some place or in possession of some person."¹⁶⁸ Investigators may prevent those present at the location of the search from leaving until the search is completed;¹⁶⁹ however, such individuals may participate in the search and may have defense counsel present during the search.¹⁷⁰ In addition, investigators must compile a thorough record of the search documenting the location, the items obtained, and the methods used to obtain the items.¹⁷¹

The grounds for conducting a seizure, however, appear somewhat more stringent: "When it is necessary to seize certain objects and documents that are relevant to the criminal case and if the location and the person in possession thereof are known for

with Article 12, which does use the word "warrant," Article 29 is interpreted as requiring procurators to obtain search, seizure, and arrest warrants. The need to go to court to obtain a warrant before proceeding with an investigation forces procurators to articulate some measurable amount of suspicion to justify the issuance of a warrant. The amount of suspicion required to obtain a warrant is not yet clear.

¹⁶⁶ *Id.* art. 165(5). It is interesting to note that Article 12(2) states that only searches and seizures in a dwelling require a judicial warrant, whereas Article 165(5) refers to searches and seizures of a dwelling and searches of a person that may occur in rare instances without a judicial warrant. Furthermore, Article 29(2) gives the courts the sole power to authorize the search of a person. The omission regarding searches of the person in Article 12 is likely a drafting oversight, but it will be interesting to see how this provision is interpreted in the case law. *Id.* arts. 12(2), 165(5), & 29(2).

¹⁶⁷ *Id.* arts. 13 & 29(2).

¹⁶⁸ *Id.* art. 182(1).

¹⁶⁹ *Id.* art. 182(8).

¹⁷⁰ *Id.* art. 182(11).

¹⁷¹ *Id.* art. 182(13).

certain, their seizure shall be carried out.”¹⁷² This section requires a showing of relevancy of the objects to be seized to a crime and also requires that the location and possessor of the objects be known “for certain,” which is a high threshold to meet.¹⁷³ In addition, investigators may only seize an individual’s financial records (deposits and accounts) pursuant to a *judicial* warrant.¹⁷⁴

6. Court-Sanctioned Arrests and Pretrial Detention

Under the new CCP, only the *courts* may decide whether to impose pretrial restraint measures and whether to extend a period of pretrial detention.¹⁷⁵ Article 10 states that no person may be arrested or otherwise confined in connection with a criminal act unless the legal grounds¹⁷⁶ specified in the CCP exist.¹⁷⁷ A person suspected of committing a crime may also be arrested if he is likely to flee, has no permanent address, has no ascertainable identity, or if a procurator has filed a motion for pretrial detention.¹⁷⁸

Once arrested, “[n]o person may be detained for more than 48 hours except pursuant to a judicial warrant.”¹⁷⁹ Detentions during

¹⁷² *Id.* art. 183(1).

¹⁷³ *See id.*

¹⁷⁴ *Id.* arts. 29(2) & 183(4).

¹⁷⁵ *See* Gessen, *supra* note 162, at 20 (stating that these articles were designed to “divest powers from Russia’s prosecutors and invest it in the country’s judiciary . . . by taking away from the prosecutors the right to issue . . . arrest . . . warrants.”). *Compare* Law on the Procuracy of the USSR, Vedomosti SSSR, 1979, No. 49, Item 843, art. 29, § 7, *amended by* Vedomosti SSSR, 1982, No. 49, Item 935, in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 173 (W.E. Butler ed. & trans., 1983) (“[T]he procurator shall, within the limits of his competence: . . . extend the period of investigation and confinement under guard as a measure of restraint in the instances and procedure established by law . . .”) *with* UPK RF art. 29(2) (“[O]nly a court may make the following decisions: 1) imposing a pre-trial restraint in the form of incarceration . . . , 2) to extend a term of pre-trial detention . . .”).

¹⁷⁶ UPK RF art. 91(1) (stating as legal grounds for arrest the following: a person caught in the act or immediately after the act, a person identified by eyewitnesses and/or the victim as the perpetrator, or clear physical evidence of a crime on a person’s body, clothes, in his possession, or in his dwelling).

¹⁷⁷ *Id.* art. 10(1).

¹⁷⁸ *Id.* art. 91(2).

¹⁷⁹ *Id.* art. 10(1); *see also id.* art. 94(2) (“Upon the expiration of 48 hours after the suspect is arrested, the suspect shall be released unless pre-trial detention has been imposed on the person or the time limit on arrest has been extended by a court.”).

criminal investigations may last no longer than two months,¹⁸⁰ unless the procurator obtains judicial permission to extend the period of detention for up to six months.¹⁸¹ A judge may extend the period of pretrial detention to up to twelve months for individuals charged with serious crimes¹⁸² but only if legal grounds for continued detention exist and only if the case is particularly complex.¹⁸³ An individual may be detained for up to eighteen months in truly exceptional cases, but no period of pretrial detention may extend beyond eighteen months.¹⁸⁴ Any individual held in excess of the statutory detention periods is entitled to immediate release.¹⁸⁵

Moreover, the CCP introduces the concept of bail to the Russian criminal justice system.¹⁸⁶ The CCP treats bail as a type of pretrial restraint measure that can be utilized instead of pretrial detention or house arrest.¹⁸⁷ Although the incorporation of a bail option into the criminal justice system represents a novel advance in Russia's available pretrial restraint measures, the procedure for implementing bail as the pretrial restraint measure in a particular case continues to preserve Soviet overtones of procuratorial supremacy.¹⁸⁸ A court, a procurator, or an inquiry officer or investigator acting pursuant to procuratorial consent may impose bail as a pretrial restraint measure.¹⁸⁹ Thus, the procuracy retains some of its power and discretion to decide upon and impose

¹⁸⁰ *Id.* art. 109(1).

¹⁸¹ *Id.* art. 109(2).

¹⁸² The Code does not define what constitutes a "serious crime." It is possible that the same classification as that used for determining which crimes may be heard by a jury will be used. In that case, "serious crimes" include "those in which the defendant could be sentenced to at least three years in prison." MARK KRAMER, RIGHTS AND RESTRAINTS IN RUSSIA'S CRIMINAL JUSTICE SYSTEM: PRELIMINARY RESULTS OF THE NEW CRIMINAL PROCEDURAL CODE 1 (PONARS, Policy Memo 289, May 2003), *available at* <http://www.csis.org/ruseura/ponars/policymemos/pm0289.pdf>.

¹⁸³ UPK RF art. 109(2).

¹⁸⁴ *Id.* art. 109(3).

¹⁸⁵ *Id.* art. 109(4).

¹⁸⁶ *See id.* art. 106.

¹⁸⁷ *Id.* art. 106(2).

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

certain pretrial restraint measures.¹⁹⁰

7. *Presumption of Innocence and Burden of Proof*

The CCP's approach to the concepts of presumption of innocence and burden of proof represents a radical departure from the earlier Soviet treatment of these two issues.¹⁹¹ In the Soviet criminal justice system, judges assumed that a procurator would not bring a case to trial unless he had a very good reason to believe that the defendant committed the crime with which he was charged.¹⁹² As a result, the vast majority of Soviet criminal cases ended in conviction, regardless of whether or not the procurator actually went to court to prove the charges against the defendant.¹⁹³

Chapter 2 of the CCP, however, begins with the premise that one of the purposes of criminal proceedings is to protect individuals from unlawful or poorly grounded charges and convictions,¹⁹⁴ elevating the need to avoid the prosecution of the innocent to the same level as the need to prosecute and sentence the guilty.¹⁹⁵ The CCP expressly states that an individual is presumed innocent until proven guilty of a crime as determined by a final court judgment, thus preserving the defendant's innocence throughout the appellate phases of the criminal justice process.¹⁹⁶ Any doubts regarding the guilt of a defendant must be resolved in his favor, and a conviction based upon mere supposition will not be upheld.¹⁹⁷ The prosecution carries the burden of proving all of the material elements of the charge(s) against the defendant as

¹⁹⁰ Compare *id.* art. 29(2) (stating that courts have the sole power to impose the pretrial restraint measures of incarceration or house arrest), with *id.* art. 106(2) (stating that courts *or* procurators have the power to impose the pretrial restraint measure of bail).

¹⁹¹ See Aron, *supra* note 8, at 2 (discussing the fact that Soviet judges were expected to help procurators obtain convictions and thus find defendants guilty).

¹⁹² See SOLOMON & FOGLESONG, *supra* note 32, at 6 (discussing the function of Soviet judges as merely confirming the evidence contained in the written case file and imposing sentences).

¹⁹³ See REMINGTON, *supra* note 22, at 212, n.13; Aron, *supra* note 8, at 2.

¹⁹⁴ UPK RF art. 6(1).

¹⁹⁵ *Id.* art. 6(2).

¹⁹⁶ *Id.* art. 14(1).

¹⁹⁷ *Id.* art. 14(3-4).

well as the burden of refuting any arguments posed by the defense.¹⁹⁸ The imposition of the concepts of presumption of innocence and burden of proof drastically affects the duties of Russian procurators, forcing them to collect evidence in a more thorough manner and better prepare their cases for trial.¹⁹⁹

8. *Inadmissible Evidence*

For the first time in Russian history, judges have the power to exclude evidence at trial obtained by a court, procurator, inquiry officer, or investigator in violation of any of the provisions of the CCP.²⁰⁰ This change represents a radical reallocation of power between the procuracy and the judiciary, as judges merely accepted whatever evidence the procurators proffered without questioning the admissibility of the evidence under the Soviet system.²⁰¹ But under the new CCP, Article 75 clearly states that inadmissible evidence has no legal basis whatsoever and may not be used to form the basis of criminal charges or as evidence at trial.²⁰²

The CCP contains a number of examples of what constitutes inadmissible evidence. First, any statements made by a suspect or an accused outside of the presence of his defense counsel during the pretrial phases of a criminal proceeding are inadmissible unless the suspect or accused acknowledges in court that he waived the right to have defense counsel present.²⁰³ This provision includes any confessions obtained as a result of torture, because Article 9 outlaws the use of torture and violence in the investigative process.²⁰⁴ Second, the testimony of a victim or witness is inadmissible if it is based upon speculation, rumor, or

¹⁹⁸ *Id.* art. 14(2).

¹⁹⁹ See Solomon & Foglesong, *supra* note 12, at 108 (discussing a modest decrease in the number of cases won by the State due to poorly prepared cases).

²⁰⁰ UPK RF art. 7(3); see also Aron, *supra* note 8, at 11 (discussing the novelty of this provision).

²⁰¹ See Aron, *supra* note 8, at 2 (discussing the subservience of trial judges to Soviet procurators).

²⁰² UPK RF art. 75(1).

²⁰³ *Id.* art. 75(2).

²⁰⁴ *Id.* art. 9(2).

hearsay.²⁰⁵ Third, any evidence obtained as the result of a warrantless inspection, search, or seizure of a dwelling, or as the result of a warrantless search of a person that a court later determines to have been conducted illegally is inadmissible.²⁰⁶ Most importantly, the CCP includes a catchall provision stating that evidence obtained in violation of *any* of the CCP's provisions will be inadmissible.²⁰⁷

9. *Double Jeopardy*

The new CCP curtails two of the most notorious powers of the procuracy under the old Soviet regime: the ability to conduct supplemental investigations²⁰⁸ and the power to request changes in criminal sentences.²⁰⁹ Prior to the passage of the new CCP, judges routinely returned weak evidentiary cases to the procurators for supplemental investigation, forcing defendants to stand trial for the same crime two or more times.²¹⁰ This procedure essentially gave prosecutors an unlimited amount of time and several opportunities to obtain a guilty verdict.²¹¹ Moreover, high-level procurators had the ability to alter a criminal sentence that they considered too lenient and that had already gone into legal effect by bringing a protest in certain high courts, claiming that the sentence was illegal or unfounded.²¹² Consequently, the finality of judicial decisions in the Soviet criminal process remained largely illusory.²¹³

²⁰⁵ *Id.* art. 75(2).

²⁰⁶ *Id.* art. 165(5).

²⁰⁷ *Id.* art. 75(2).

²⁰⁸ Law on the Procuracy of the USSR, *Vedomosti SSSR*, 1979, No. 49, Item 843, art. 29, § 8, amended by *Vedomosti SSSR*, 1982, No. 49, Item 935, in *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 173 (W.E. Butler ed. & trans., 1983) (giving the procurator the ability to direct and oversee additional investigation conducted by inquiry and investigation agencies).

²⁰⁹ *Id.* art. 33 (protest of decisions, judgments, rulings, and decrees of courts by way of cassation); Aron, *supra* note 8, at 2.

²¹⁰ Aron, *supra* note 8, at 2; Barikhnovskaya, *supra* note 46, at 100.

²¹¹ See Aron, *supra* note 8, at 11.

²¹² Law on the Procuracy of the USSR, arts. 33-35; see also Barikhnovskaya, *supra* note 46, at 101 (stating that review of a protest to overturn an acquittal or a criminal sentence is limited to one year after a legal judgment goes into effect).

²¹³ See Barikhnovskaya, *supra* note 46, at 101.

The provisions of the new CCP, however, virtually eliminate the procuracy's ability to conduct supplementary investigations.²¹⁴ First, Article 237 expressly states that when a court returns a case to a procurator, the procurator may not conduct any investigative or take other procedural actions not authorized by that provision.²¹⁵ A judge may return a criminal case to a procurator upon the motion of either party or at his own initiative in order to cure certain enumerated procedural defects in the case.²¹⁶ The procurator has only five days in which to cure the procedural violations,²¹⁷ and any evidence obtained after that time limit or through actions not specified in the article is deemed inadmissible.²¹⁸

By contrast, the provisions limiting the procuracy's ability to alter criminal sentences that have already entered into legal effect and to reverse acquittals lack a clear prohibition on double jeopardy. A criminal prosecution²¹⁹ must be dismissed if a judgment or sentence against the accused on the same charges has already taken legal effect.²²⁰ In addition, a criminal prosecution must be dismissed if a judge has previously issued a ruling or order dismissing a criminal case based on the same charges against the accused.²²¹ Further reinforcing the provisions of Article 27, Article 405 states that upon supervisory review, a court is forbidden from worsening the position of a criminal defendant, either by increasing a defendant's sentence or by reversing an

²¹⁴ See, e.g., UPK RF arts. 27 (grounds for dismissing a criminal prosecution) & 237 (returning a criminal case to the procurator).

²¹⁵ *Id.* art. 237(3).

²¹⁶ *Id.* art. 237(1) (listing the following as proper grounds for the return of a case to a procurator: improperly drawn bill of charges or indictment, improper service of process, the need to draw up a bill of charges or indictment in conjunction with an order for involuntary medical treatment, instances of joinder, and a failure to advise the accused of his rights).

²¹⁷ *Id.* art. 237(2).

²¹⁸ *Id.* art. 237(5).

²¹⁹ The CCP distinguishes between a "criminal case" (*ugolovnoye delo*) and a "criminal prosecution" (*ugolovnoye presledovaniye*). A criminal case is filed for every commission of a crime, regardless of whether a suspect is ever identified. A criminal prosecution refers to the attempt to convict a particular person of a particular crime. *Id.* art. 24(3), n.32.

²²⁰ *Id.* art. 27(1).

²²¹ *Id.*

acquittal or dismissal.²²² Yet, the CCP grants procurators a broad right of appeal of jury acquittals in Article 370, stating that a “judgment of acquittal may be reversed by an appellate court and a judgment of conviction entered in its place” if a procurator contests the “validity of the acquittal.”²²³ Moreover, Article 385 permits the reversal of jury acquittals if the violation of criminal procedure law that occurred interfered with the procurator’s ability to present evidence or affected the contents of the jury questions.²²⁴ Thus, the CCP’s treatment of double jeopardy is unclear and inconsistent, permitting procurators to retain vast powers of appeal.²²⁵

10. Trial by Jury

The CCP reintroduces into the Russian criminal justice system an institution that had been eliminated by the Communists: the concept of trial by jury.²²⁶ Beginning in 2003, Russia began to phase in twelve-juror panels in its federal courts of general jurisdiction in all of its regions.²²⁷ Defendants accused of serious crimes, such as murder, rape, and terrorism, may now choose to have a jury rather than a bench trial.²²⁸ The use of jury trials will help to reinforce the notion of an adversary process between equals, forcing procurators to better prepare their cases and resulting in verdicts free from undue influence.²²⁹

IV. Preliminary Results: A Successful Reallocation of Power?

Although the CCP has only been in effect for two years and a thorough assessment of its implementation will not be possible for several more years, a preliminary evaluation of its impact on the

²²² *Id.* art. 405.

²²³ *Id.* art. 370; *see also* Orland, *supra* note 15, at 148 (discussing the right of procurators to appeal jury acquittals).

²²⁴ UPK RF art. 385.

²²⁵ *See* Orland, *supra* note 15, at 148.

²²⁶ *See* UPK RF art. 30(2); *see also* Peter Baker, *Russia Tests Juries by Trial and Error: Courts Slowly Shedding Soviet Model*, WASH. POST, Sept. 2, 2003, at A1 (profiling the implementation of the first jury trial in Moscow City Court).

²²⁷ *See* Baker, *supra* note 226.

²²⁸ UPK RF art. 30(2).

²²⁹ *See* SOLOMON & FOGLESONG, *supra* note 32, at 12.

reallocation of power among judges, procurators, and defense attorneys is nevertheless possible.²³⁰ This section will analyze the effects of the CCP on two levels: first, looking individually at the implementation of the CCP provisions that specifically redistribute power among judges, procurators, and defense attorneys, and second, looking holistically at the broader effects of these provisions as a general theory of criminal procedure law.

*A. Successful Implementation of Specific CCP Provisions
Reallocating Power Among Judges, Procurators, and
Defense Attorneys?*

1. Defense Counsel

Limited access to criminal defense lawyers has greatly impaired the success of many of the CCP's provisions related to defense counsel.²³¹ First, the number of defense lawyers working in Russia remains low, especially in the outlying regions.²³² More importantly, defense attorneys have increasingly become the targets of police intimidation and coercion, suffering from beatings and arbitrary arrests.²³³ Professional associations report that such abuses occur throughout the country and at all levels of the judicial system, but the perpetrators are rarely held accountable for their actions.²³⁴ The attacks on defense attorneys are designed to cause intimidation and to cover up the criminal activities of the police themselves.²³⁵

As a result of the assaults on the already small number of defense attorneys, the CCP's guarantee of a right to counsel has been significantly undermined.²³⁶ Aside from the possibility of

²³⁰ KRAMER, *supra* note 182, at 1.

²³¹ *Id.* at 3.

²³² See *From Russia with Law*, COLUMBUS DISPATCH, July 18, 2002, at 14A.

²³³ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2003: RUSSIA ¶ 73 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27861.htm>; KRAMER, *supra* note 182, at 5.

²³⁴ KRAMER, *supra* note 182, at 5.

²³⁵ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 73; KRAMER, *supra* note 182, at 5.

²³⁶ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 71; KRAMER, *supra* note 182, at 3, 5.

physical retaliation, many lawyers refuse to serve as public defenders because the government fails to pay them for their services.²³⁷ Furthermore, most established large law firms do not engage in pro bono work, with the inevitable result being that many indigent defendants do not receive the legal representation guaranteed to them by the CCP and the 1993 Constitution.²³⁸

Other abuses that violate the CCP, such as denying defense attorneys access to their clients²³⁹ and locking defense attorneys out of the courtroom during trial hearings, persist.²⁴⁰ But the most disheartening factor undermining the CCP's provisions for defense counsel is the failure of defendants to exercise their right to assistance of counsel because they feel that such an effort would be ultimately fruitless.²⁴¹ For these reasons, it appears that the provisions of the CCP improving the rights of defense counsel have remained largely unenforced and face significant hurdles to implementation in the future.

2. *Adversarial Proceedings*

Although the CCP has improved the adversarial nature of criminal trials in Russia, relics of the old Soviet mentality remain.²⁴² Many judges have quickly adapted to their new role as

²³⁷ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 71; KRAMER, *supra* note 182, at 3. The Federal Russian Bar, established in January, 2003, undertook the task of designing a system of indigent defense, but the literature does not contain any information about the current status of that initiative. BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 71. Nevertheless, this marks an important step in guaranteeing all Russian citizens a right to counsel.

²³⁸ KRAMER, *supra* note 182, at 3.

²³⁹ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2002: RUSSIA ¶ 65 (2002), available at <http://www.state.gov/g/drl/rls/hrpt/2002/18388.htm> (denying defense counsel access to their clients by restricting visiting hours in the prisons); see also Susan B. Glasser & Peter Baker, *Prosecution Puts Russian "Rule of Law" on Trial; Billionaire's Case Invites Scrutiny of Justice System*, WASH. POST, Oct. 30, 2003, at A11 (denying the defense attorneys access to their clients for days after their arrests).

²⁴⁰ Glasser & Baker, *supra* note 239 (locking defendant Lebedev's defense attorneys out of the courtroom while the judge and prosecutor discussed the legitimacy of Lebedev's arrest).

²⁴¹ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 70.

²⁴² See *Justice for Russians*, N.Y. TIMES, Sept. 8, 2003, at A22.

neutral arbiters, especially in the major cities such as Moscow,²⁴³ but a large number of judges continue to favor the prosecution in criminal trials.²⁴⁴ This bias towards the prosecution originates not only from ingrained Soviet norms, but also from the continued lack of respect accorded to the judiciary.²⁴⁵ Judges remain substantially underpaid, which leaves them susceptible to bribes and intimidation and erects barriers to the recruitment of young, talented people into the profession.²⁴⁶ In addition, judges must endure poor working conditions and do not have access to adequate support staff, forcing them to rely upon procurators for information in particular cases.²⁴⁷ Despite these continued setbacks to judicial independence, the JQCs have begun to actively discipline their colleagues for violations, thus inserting a degree of transparency into the judicial system.²⁴⁸ In addition, the new Academy of Justice recently began operating as a training center for judges.²⁴⁹

As a result of the problems mentioned in the previous section, the participation of defense attorneys in criminal trials has not been as extensive as the CCP envisioned.²⁵⁰ Defense attorneys remain largely subservient to the procurators, arguing for reduced sentences rather than asserting the innocence of their clients.²⁵¹ Nevertheless, the physical presence of defense attorneys in the

²⁴³ KRAMER, *supra* note 182, at 4; *see also* Marjorie Farquharson, *After One Year, New Russian Criminal Procedure Code Is Showing Results*, RFE/RL NEWSLINE, July 31, 2003, at <http://www.rferl.org/newsline/2003/07/310703.asp> (noting that acquittals in bench trials have risen from 0.4% to 2%).

²⁴⁴ KRAMER, *supra* note 182, at 4; *see also* Baker, *supra* note 226 (describing the biased actions of Judge Shtunder in the murder trial of Igor Bortnikov, in which the judge informed the defense attorneys that doubting the validity of the investigation was illegal); Anatoly Medetsky, *Danilov Acquitted by a Jury*, MOSCOW TIMES, Dec. 30, 2003 ("Danilov's jury trial . . . was closed to the public, Judge Andrei Kulyabov prevented some of the defense's witnesses . . . from testifying and refused to accept some of the evidence."), available at 2003 WL 66305773.

²⁴⁵ KRAMER, *supra* note 182, at 4.

²⁴⁶ *Id.*; Solomon, *Judicial Power in Russia*, *supra* note 52, at 573.

²⁴⁷ KRAMER, *supra* note 182, at 4.

²⁴⁸ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶¶ 66-67.

²⁴⁹ *Id.*

²⁵⁰ *See* KRAMER, *supra* note 182, at 5.

²⁵¹ *Justice for Russians*, *supra* note 242.

courtroom has increased, and they are utilizing their new powers to question the automatic admission of procuratorial evidence.²⁵² In fact, defense attorneys are often better prepared at trial than procurators, resulting in harsh criticisms of the way procurators prepare their cases.²⁵³ Thus, despite the lingering presence of a procurator-dominated process, the concept of an adversary system of justice has taken root in Russia, and it remains to be seen how effectively these provisions of the CCP will continue to be implemented.

3. *Search and Seizure*

Unfortunately, enforcement of the articles requiring the acquisition of a judicial warrant prior to conducting an inspection, search, or seizure constitutes a major exception to the successful implementation of the CCP.²⁵⁴ Law enforcement officials continue to enter homes and buildings without judicially-issued warrants and no reports of government action taken against the perpetrators exist.²⁵⁵ Police have also prevented individuals from seeing the actual search warrant and from monitoring the search, and have failed to make proper inventories of the items seized.²⁵⁶ Reports also state that the government continues to conduct unauthorized electronic surveillance of individuals.²⁵⁷ Consequently, the area of search and seizure continues to be dominated by the procuracy and law enforcement, thwarting the CCP's attempt to impose some type of judicial oversight of these actions.

4. *Court-Sanctioned Arrests and Pretrial Detention*

The provisions of the CCP that require procurators to obtain a warrant from a judge before conducting an arrest and the

²⁵² See, e.g., Baker, *supra* note 226 (describing the defense attorneys' objections, albeit unsuccessful, to the admission of certain evidence).

²⁵³ Farquharson, *supra* note 243.

²⁵⁴ See *id.*

²⁵⁵ *Id.*

²⁵⁶ See, e.g., *Prosecutors Say Surveillance Equipment Seized in Yukos Search*, PRIME-TASS, July 14, 2003 (discussing alleged violations that occurred during a 16-hour search of the Yukos oil company's archives), available at 2003 WL 66198293.

²⁵⁷ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 81.

provisions that impose stringent limits on pretrial detention have encountered substantial opposition but have nevertheless been generally obeyed.²⁵⁸ Indeed, the warrant requirement for arrests has had a radical impact on the Russian criminal justice system.²⁵⁹ On July 1, 2002, when the new CCP came into effect, virtually no arrests were conducted in Russia because procurators had already arrested all of the individuals that they could under the provisions of the old *Code of Criminal Procedure*.²⁶⁰ A week later in Moscow, procurators had submitted only forty-five applications for arrest warrants, down one-sixth from the roughly 260 arrest warrants procurators had issued to themselves over the same period in the previous year.²⁶¹

Admittedly, procurators continued to make some arbitrary arrests without warrants, but judicial oversight of arrests improved significantly.²⁶² Six months after the CCP's implementation, the number of criminal cases instigated by the procuracy fell by 25% and judges rejected 15% of all arrest warrant applications.²⁶³ By July 2003, the number of arrests in Russia had fallen by 50%.²⁶⁴ Although it is unclear why the number of applications for arrest warrants and the number of arrests themselves has decreased so dramatically, these statistics and the complaints from Russian

²⁵⁸ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 51.

²⁵⁹ *See id.* (noting that the Supreme Court overturned a number of cases because lower court judges allowed detention of individuals for inadequate grounds and excessive time periods).

²⁶⁰ Anastasia Kornya et al., *Day of Judgment*, MOSCOW NEWS WKLY., July 3, 2002, at 12, available at <http://www.mn.ru/english/issue.php?2002-25-2>.

²⁶¹ *Reform of Russian Criminal Code Leads to Far Fewer Arrests* (Russia TV television broadcast, July 9, 2002), available at 2002 WL 23920086. According to Judge Tamara Razgulova, the court chairperson for the Golovinsky intermunicipal court, "[T]he very delay is a sign that from now on prosecutors will be more particular about their arrests." Kornya et al., *supra* note 260.

²⁶² BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 44.

²⁶³ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 9. By the end of 2003, courts approved 92% of law enforcement requests for arrests. BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 44. Of those decisions, 10% were appealed and 87% of the arrests were upheld by the higher courts. *Id.* The decrease in the number of criminal cases initiated by the procuracy coupled with the increase in judicial arrest warrant approval shows that procurators are becoming more selective in their arrests.

²⁶⁴ Farquharson, *supra* note 243.

security organs about the constraints they face under the new CCP strongly suggest compliance with the arrest warrant provisions.²⁶⁵

Similarly, the courts have strongly asserted their new rights to make pretrial detention determinations.²⁶⁶ The Russian Supreme Court has directed all judges to strictly enforce the statutory limits for pretrial detention outlined in the CCP and it appears that Russian judges have closely followed this instruction.²⁶⁷ In some areas, judges have rejected up to 30% of requests for pretrial detention, and the Supreme Court has reversed several detention orders imposed by lower courts, which were based upon what the Court considered to be inadequate grounds.²⁶⁸ In addition, judges have used their power to free prisoners in Chechnya, to release individuals held in excess of detention limits, and to release suspects who confessed to crimes without an attorney present.²⁶⁹ During the first six months under the CCP, procurators made no requests to extend the detention limits and most cases went to trial within the prescribed six months.²⁷⁰ Although not all courts fully enforced the pretrial detention requirements, the overall compliance with this aspect of the CCP has been encouraging.²⁷¹

Furthermore, active and effective judicial oversight of pretrial detention has had unexpected and extremely beneficial consequences for other parts of the Russian criminal justice system.²⁷² According to human rights advocates, the strict time limits on detention without access to counsel or family members as well as the attenuated timeline for bringing a criminal case to trial have substantially decreased the use of torture and other

²⁶⁵ KRAMER, *supra* note 182, at 2.

²⁶⁶ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 46.

²⁶⁷ *Id.*

²⁶⁸ *Id.* ¶ 51. Between January and May of 2003, the Russian courts received roughly 37,000 applications for the extension of pretrial detention and the courts approved 35,000. BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 54.

²⁶⁹ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 51.

²⁷⁰ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 54.

²⁷¹ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 51. *But see* Simon Ostrovsky, *Courts Deny Bail to Khodorkovsky, Lebedev*, MOSCOW TIMES, Dec. 24, 2003 (citing Khodorkovsky's attorney as alleging that the Besmanny district court committed numerous procedural violations in denying the defendant bail), *available at* 2003 WL 66305745.

²⁷² BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 39.

abusive activities by the police.²⁷³ Moreover, enforcement of the pretrial detention limits has served to decrease both the number of individuals held in prison and the length of time they stay in prison, helping to reduce the intolerable level of overcrowding in Russian prisons.²⁷⁴

5. *Presumption of Innocence and Burden of Proof*

Unfortunately, these imported Western juridical concepts remain largely just that: under-utilized theoretical concepts.²⁷⁵ The very essence of a presumption of innocence is eliminated by the retention of the use of the Soviet cage.²⁷⁶ Throughout the criminal trial, the defendant remains seated in a large metal cage, sending a subconscious signal of guilt to the new Russian juries.²⁷⁷ In addition, although the standards of proof²⁷⁸ for convictions have risen²⁷⁹ and procurators ostensibly have the burden to prove an individual's guilt, most judges still place a heavy burden on the accused to prove his innocence.²⁸⁰ For example, in 2002, higher courts reversed about 40% of acquittals, whereas higher courts reversed only 0.05% of criminal convictions.²⁸¹ Although the new CCP arguably forbids higher courts from reversing acquittals in certain types of cases, this statistic sends a powerful message to judges, because one of the most important criteria considered in evaluating judicial performance is a judge's reversal rate.²⁸² Thus, the effective implementation of the concepts of presumption of

²⁷³ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 29 (discussing how the CCP's provisions may help to decrease the use of torture as an investigative technique).

²⁷⁴ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 39 (noting that the SIZO (pretrial detention facilities) prison population has decreased by 46% since 2000). Although beyond the scope of this Comment, an analysis of the effects that the recently passed judicial legislation has had on the prison system would be insightful.

²⁷⁵ See KRAMER, *supra* note 182, at 2.

²⁷⁶ See Baker, *supra* note 226.

²⁷⁷ See *id.*

²⁷⁸ At this point in time, unlike the U.S. "guilty beyond a reasonable doubt" standard, the Russian standard of proof is not clearly defined.

²⁷⁹ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 49.

²⁸⁰ KRAMER, *supra* note 182, at 2.

²⁸¹ *Id.*

²⁸² *Id.*

innocence and burden of proof has not yet occurred and will likely not occur until the higher courts send the lower courts clear signals that they are ready to accept acquittals in criminal cases.

6. *Inadmissible Evidence*

Currently, there is limited information on whether judges are refusing to admit illegally obtained evidence in criminal trials.²⁸³ Many criminal defendants have attempted to retract their pretrial confessions, claiming that the police denied them access to a lawyer, coerced them into making a confession, or that they confessed in order to avoid the abysmal conditions of the pretrial prisons.²⁸⁴ Although the incidence of coerced confessions has decreased since the CCP came into effect,²⁸⁵ many courts have continued to reward police for using improper interrogation tactics and have refused to hold such evidence inadmissible at trial.²⁸⁶ Nevertheless, human rights groups suggest that the provision for the inadmissibility of confessions made outside the presence of counsel will further reduce the use of torture and beatings as an investigative technique.²⁸⁷

7. *Double Jeopardy*

The provisions of the CCP limiting the occurrence of supplemental review and double jeopardy appear to be unevenly enforced.²⁸⁸ Just two-and-a-half weeks after the new CCP came into force, the Russian Constitutional Court handed down a landmark decision²⁸⁹ in which it ruled that the provisions of the old *Code of Criminal Procedure*, which permitted the procurator to petition a higher court to impose a harsher sentence,²⁹⁰ violated the

²⁸³ See BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 49.

²⁸⁴ *Id.* ¶ 70.

²⁸⁵ See BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 29.

²⁸⁶ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233, ¶ 49; KRAMER, *supra* note 182, at 4; AMNESTY INTERNATIONAL, JUSTICE FOR EVERYBODY: HUMAN RIGHTS IN THE RUSSIAN FEDERATION – TORTURE AND ILL-TREATMENT (2003), available at <http://www.amnesty.org/russia/torture.html>.

²⁸⁷ BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 29.

²⁸⁸ See KRAMER, *supra* note 182, at 5.

²⁸⁹ *Russian Constitutional Court Praised for Ruling on Appeals Procedure*, BBC MONITORING, available at July 17, 2002, LEXIS, Nexis Library.

²⁹⁰ UPK RSFSR art. 371 (1960) (amended 1972), in SOVIET CRIMINAL LAW AND

1993 Constitution.²⁹¹ Citing the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁹² the Constitutional Court held that the reversal of an acquittal through the supervisory process is unconstitutional except in truly exceptional cases.²⁹³ This decision not only hindered the ability of procurators to overturn acquittals and to alter sentences that have already entered into legal effect under the old Code, but it arguably sent procurators a strong signal about how the Russian courts will interpret the double jeopardy provisions in the new CCP.²⁹⁴ Nevertheless, procuratorial distrust of juries has led many procurators to continue to appeal jury acquittals,²⁹⁵ thereby obscuring the true extent of a defendant's protection against double jeopardy.

On the other hand, since the new CCP came into effect, procurators and the police have made numerous complaints about their inability to retry defendants on the same charges.²⁹⁶ Many have attempted to circumvent the apparent prohibition on double jeopardy by charging acquitted defendants with new, superficially different crimes, but higher courts have disallowed blatant attempts to get around the new provisions.²⁹⁷ The complaints of the procurators and police show that some protections against double jeopardy are occurring, but general enforcement of the

PROCEDURE: THE RSFSR CODES 203 (Harold J. Berman & James W. Spindler trans., 1972).

²⁹¹ *Second Thoughts on New Criminal Procedure Law*, 54 CURRENT DIG. POST-SOVIET PRESS 5, 6 (2002) (citing Maksim Glikin, *Once a Person Has Been Acquitted, He Can't Be Sent Back to Jail: Constitutional Court Rules That Prosecutors Were Wrong to Appeal Excessively Lenient Sentences*, NEZAVISIMAYA GAZETA, July 18, 2002, at 2).

²⁹² Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ., T.S. Nos. 5, 9, 44, 45, 46, 55, 114, 117, 118, 140.

²⁹³ *Second Thoughts on New Criminal Procedure Law*, *supra* note 291, at 6 (giving as an example of an exceptional case as one where the court forgets to add the remainder of an old sentence to the new sentence).

²⁹⁴ See *id.* But see Orland, *supra* note 15, at 148 (emphasizing the lack of clarity of the CCP provisions dealing with prosecutorial appeals of jury acquittals).

²⁹⁵ See, e.g., Medetsky, *supra* note 244 (stating that the prosecutor would appeal Danilov's jury acquittal to the Supreme Court on the basis of numerous procedural violations).

²⁹⁶ KRAMER, *supra* note 182, at 5.

²⁹⁷ *Id.*

double jeopardy provisions remains uneven.²⁹⁸

8. *Trial by Jury*

Jury trials have been implemented throughout Russia, but face many obstacles to acceptance and efficacy.²⁹⁹ The number of judges and attorneys trained to conduct jury trials is too small, and most of the crumbling, Soviet-era courtrooms require extensive remodeling before they can accommodate the new juries.³⁰⁰ Jurors are chosen from voter registration lists, but many prospective jurors have blatantly refused to serve due to the minimal or non-existent compensation.³⁰¹ Courts do not penalize prospective jurors who refuse to serve and the remaining jury pool results in skewed jury compositions.³⁰² In addition, Russian judges still retain considerable powers during the trials, including the power to pronounce the defendant's sentence if the jury has reached a determination of guilt.³⁰³

Critics of jury trials condemn the experiment due to its unacceptably high, in their opinion, acquittal rate of about 20%.³⁰⁴ Although this figure is low by U.S. standards,³⁰⁵ Russian procurators believe that such high acquittal rates result in the release of dangerous criminals.³⁰⁶ Moreover, prior to the passage of the CCP, higher courts repeatedly reversed jury acquittals on appeal and advised lower court judges on the desired outcome of particular cases prior to the bringing of an appeal.³⁰⁷ For example, in 2002, the Supreme Court reversed 32% of the jury acquittals it considered and, in 2001, the Supreme Court reversed 43% of jury

²⁹⁸ *See id.*

²⁹⁹ *See id.* at 6.

³⁰⁰ *Id.*

³⁰¹ *Id.*; *see also* Baker, *supra* note 226 (describing the refusal of working-age men to serve as jurors).

³⁰² *E.g.*, Baker, *supra* note 226 (noting that the jury was composed primarily of older individuals, predominantly women, who do not work on a daily basis).

³⁰³ *See id.*

³⁰⁴ KRAMER, *supra* note 182, at 6; Baker, *supra* note 226; *Justice for Russians*, *supra* note 242.

³⁰⁵ *Justice for Russians*, *supra* note 242.

³⁰⁶ *See* KRAMER, *supra* note 182, at 6.

³⁰⁷ *Justice for Russians*, *supra* note 242.

acquittals.³⁰⁸

Nevertheless, jury trials have met with some success in the criminal justice system and with the public in general.³⁰⁹ In the courtroom, juries have begun to question evidence, forcing the procurators to account for their conclusions.³¹⁰ Because juries were not historically a part of the Soviet criminal process, many juries have been able to reach independent conclusions about the facts of a case, free of the lingering Soviet-era mentalities.³¹¹ Most importantly, "a majority of defense attorneys, defendants, and the public favor[] jury trials,"³¹² and jurors themselves appreciate the opportunity to be included in the criminal justice system.³¹³ Thus, jury trials have obtained a tentative but firm foothold in the Russian criminal justice system.

B. Successful Implementation of the CCP as a General Theory of Criminal Law?

The most significant hurdle to the successful implementation of the CCP provisions that reallocate power among the judicial actors is overcoming the deeply-ingrained, cynical view of the criminal justice system generated by the Soviet experience and held by almost every Russian citizen.³¹⁴ Creating confidence in a criminal justice system historically dominated by the politically powerful procurators, with no history of an independent judiciary, and a long tradition of rampant corruption is an uphill battle.³¹⁵ According to a 2003 Public Opinion Foundation poll, 70% of Russians surveyed stated that they believed that Russian courts

³⁰⁸ Baker, *supra* note 226.

³⁰⁹ See BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 67.

³¹⁰ Baker, *supra* note 226.

³¹¹ See *id.*

³¹² BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 239, ¶ 67; see also Baker, *supra* note 226 (quoting the defendant Bortnikov as saying, "Only my attorney's skills and the fact that I had a jury saved me. If it had been like it was before, with just one judge, nobody would have listened to me.").

³¹³ Baker, *supra* note 226.

³¹⁴ See Aron, *supra* note 8, at 12.

³¹⁵ See Glasser & Baker, *supra* note 239; see also Solomon, *Judicial Power in Russia*, *supra* note 52, at 572 ("[P]ublic attitudes toward the courts remain ambivalent at best, and much of the public sees the courts as inefficient and biased, if not also corrupt.").

neither operated independently nor were they guided in their actions solely by the law.³¹⁶

The lawlessness and terror under the Soviet regime has created the perception that criminal justice can be bought and sold.³¹⁷ For example, Igor Bortnikov explained why he chose a jury trial in this way: "When there's only one judge, he has his own personal opinion, and he's always bought and paid for to give a larger sentence. I wanted more people to participate. It would be harder to pay off each of them."³¹⁸ When told that U.S. juries must unanimously find a defendant guilty of murder rather than the simple majority required in Russia, Bortnikov's astonished attorney replied, "Then, you only have to buy one."³¹⁹ Although Russian distrust of the criminal justice system is not always misplaced, because corruption and abuse are still significant problems, it fails to take into account the improvements that have occurred over the last decade.³²⁰ The Russian government has just begun to address this problem by conducting public education programs to explain the criminal justice process and the rights of citizens within that process.³²¹ But until the Russian people are ready to place their trust in the criminal system as a place where ordinary citizens can obtain justice, the guarantees of the new CCP will remain incompletely implemented and the concept of a rule-of-law state will suffer.³²²

V. Conclusion

This Comment has sought to evaluate the efficacy of the CCP provisions that reallocate power among Russian procurators, judges, and defense attorneys two years after the implementation of the CCP. Although procurators have successfully worked to

³¹⁶ Baker, *supra* note 226.

³¹⁷ *See id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *See generally* BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 233 (detailing the improvements to the Russian criminal justice system and, specifically, the judiciary).

³²¹ *Id.* ¶ 50 (discussing the creation of the "Public Trust" program).

³²² *See* Aron, *supra* note 8, at 12 (discussing the need for a popular belief in the criminal justice system in order for a true Russian *Rechtsstaat* to emerge).

undermine several of the CCP's attempts to level the field for judicial actors, strong enforcement of other provisions has significantly curtailed the power of procurators in favor of Russian judges and defense attorneys. It is important to keep in mind that Russian procurators, judges, and defense attorneys have only just begun to explore the parameters of the new CCP.³²³ Therefore, the ultimate success of the CCP's fundamental reallocation of power among the procuracy, judiciary, and defense bar depends upon a number of interrelated factors, the most important of which is continued government support for reform and strict enforcement of the CCP itself.³²⁴

First, the government must take further steps to ensure that the Russian judiciary attains true and complete independence. President Putin's government has promised to spend \$1.5 billion over the course of three years to develop Russia's judicial system,³²⁵ including a 300% increase in judges' salaries,³²⁶ a promise which the government must keep. Expenditures on judicial training, judicial salaries, courtroom safety, and wholesale remodeling of Russia's derelict courthouses would produce a number of benefits: enhanced judicial self-esteem, decreased susceptibility to bribes and outside influences, higher quality support staff, greater access to sources of current law, and the attraction of young, talented individuals into the profession. These hallmarks of a truly independent judiciary would begin to erode ingrained Soviet perceptions of judicial corruption, replacing them with greater confidence in the criminal justice system as a whole.

Similarly, the Russian government needs to increase its funding and support for criminal defense attorneys in order for the defense to operate as a sufficient counterweight to the still-powerful procurators. The current number and quality of defense attorneys is woefully inadequate to meet the new demands of a right to counsel and jury trials guaranteed by the new CCP.

³²³ Mark McDonald, *New Code Protects Russian Defendants*, ST. PAUL PIONEER PRESS, Mar. 16, 2003, at 3A.

³²⁴ See Boylan, *supra* note 8, at 12.

³²⁵ *From Russia With Law*, *supra* note 232.

³²⁶ Alex Nicholson, *Legislative Changes Set a Fast and Furious Pace*, MOSCOW TIMES, Jan. 23, 2003, at 14, available at <http://dlib.eastview.com/sources/article.jsp?id=4641749>.

Government-funded training programs would help to increase the quality and prestige of Russia's defense attorneys. In addition, punishing individuals who harass and attack defense attorneys would send a clear message about the defense attorney's role in Russia's new criminal justice system as well as establish a credible commitment towards a rule-of-law state. Finally, a system of national indigent defense and/or the introduction of pro bono requirements would help to ensure that the guarantee of legal representation is upheld.

In addition, some scholars have suggested that the Soviet-style procuracy be dismantled and replaced with a public prosecutor's office modeled after a recent Council of Europe paper that details the functions of a public prosecutor's office in a modern democracy.³²⁷ Eliminating the procuracy and replacing it with modern public prosecutors' offices would help to dispel the stigma of injustice and unfairness associated with the old Soviet procuracy and would reinforce the government's commitment to criminal justice reform.³²⁸

Next, strict adherence to the provisions of the CCP is important to its efficacy and validity in the eyes of Russian citizens. Rigid judicial enforcement of the arrest warrant and pretrial detention provisions should continue and be extended to the search and seizure provisions. Procurators and police who violate these provisions should endure harsh repercussions, including the enforcement of CCP provisions that make illegally obtained evidence inadmissible at trial. Furthermore, strict compliance with the prohibition against supplemental investigation and narrow interpretations of the double jeopardy provisions will entrench the much-needed concept of finality into Russian jurisprudence.

The effective implementation of the concepts of presumption of innocence and burden of proof depend largely upon overcoming deeply-rooted Soviet norms. A trial must be viewed as a forum for determining the truth rather than as a mere incident to conviction. In addition, Russian trials must truly become adversary contests between equals, presided over by a neutral arbiter and shifting the burden of proof back to the State.

³²⁷ Boylan, *supra* note 8, at 12.

³²⁸ *Id.*

The most difficult obstacle to overcome, however, is the average Russian citizen's skeptical view of the criminal process as a system designed to produce justice. Although procurators continue to disregard many of the new restraints on their previously unchecked powers, procurators are also beginning to relinquish some of their control to other bodies and comply with the provisions of the CCP. Similarly, judges are developing greater self-confidence and independence as they begin to assume their new role in the criminal trial process, despite some latent abuse and corruption. Although analyses of the criminal justice system should be accurate, the Russian government needs to place greater emphasis on the positive improvements achieved thus far. Most importantly, however, the Russian government, as well as international supporters, must have patience because such a radical reversal in perception occurs over an extended period of time and will likely not begin until Russian citizens can point to more concrete improvements. This in itself creates a problem, though, because concrete changes often cannot occur without popular support for and faith in the system. Consequently, eliminating entrenched Soviet views of a criminal justice system that provides anything but justice will likely prove to be the most enduring obstacle to the complete and successful implementation of the principles embodied in the new CCP.

Thus, the current attempts to implement the CCP provisions that reallocate power among procurators, judges, and defense attorneys represent a sharp break with Russia's repressive Soviet past and constitute a positive, if only tentative, step towards the creation of a Russian state that upholds and protects the rights of its citizens. Although these provisions face many challenges to their complete implementation in the years to come, the limited success of their current implementation bodes well for the future implementation of these provisions specifically and the CCP as a whole.

LAUREN CHEN